In their affidavit opposing the plaintiff's application for summary judgment in the earlier action, CDSB had alleged undue delay on the part of the plaintiff as they had applied for summary judgment some twenty months after the filing of the statement of defence. The appeal against the learned Senior Assistant Registrar's decision was allowed on 25 February 1991.

The defendants here have relied on identical facts and issues raised by CDSB in the earlier action and it has been submitted that by virtue of s. 87 of the Contracts Act 1950, their liability is co extensive with that of CDSB and since CDSB had been given unconditional leave to defend in the earlier action, the defendants here should also be given that same opportunity.

The contention of the plaintiff is that the appeal by CDSB in the earlier action had been allowed not on the merits but only on the point of unexplained undue delay in making the application for summary judgment but to my mind, as it stands, CDSB has yet to be held liable to the plaintiff for the debt and summary judgment cannot therefore be given against the defendants here as guarantors. They are therefore also entitled to being given unconditional leave to defend. In any case, leaving the issue of estoppel aside, the defendants here have also raised a number of other triable issues including the variation of the facilities by the securing of the deposit of a title deed to land held under Grant No. 9267 Lot 41548 Mukim of Kuala Lumpur, the actual value of the shares deposited with the plaintiff, and the lack of consideration for the guarantee.

In these circumstances, I had allowed the appeal with costs. As for the defendants' other appeal against the learned Senior Assistant Registrar's decision disallowing a stay which was heard at the same time, I had held that no order was necessary in view of my allowing their appeal against the summary judgment.

YUSOF BIN AHMAD

v.

SYARIKAT KUANTAN LUMBER SDN. BHD.

HIGH COURT, KUANTAN
DATO' HJ. LAMIN BIN HJ. MOHD. YUNUS J.
[CIVIL SUIT NO. 191 OF 1976]
5 AUGUST 1992

TORT: Claim for personal injuries - Accident at work place - Claim of negligence against employer, the defendant - Claim of contributory negligence - Quantum of damages.

The plaintiff's foot was crushed by a piece of machinery known as a log carriage being operated by one of the defendant's employees. The plaintiff claimed that he instructed the machine operator to stop the machine by raising his hand in order to enable him to retrieve a hook which had fallen under the machine. However the machine operator failed to stop the machine and the log carriage reversed over and crushed his foot while he was standing on the roller support.

The machine operator (DW2) admitted that he was in complete charge of the machine and that the whole operation took place in his full view. He further admitted that it was his duty to see to the safety of the plaintiff and that he was charged with the responsibility of supervising the plaintiff's work.

Held:

[1] Before DW2 decided to reverse the log carriage it must be his duty to see that there was nothing placed in imminent danger and that it was safe for DW2 to bring back the carriage to its original position behind him.

[2] DW2's failure to be on the look-out when he was responsible for the safety of the plaintiff amounts to negligence. As for the plaintiff, the fact that he did not make sure whether DW2 would stop the carriage amounted to contributory negligence.

[3] Liability in apportioned between the defendant and the plaintiff at 60% - 40%.

[Claim allowed with interest and costs.]

Cases referred to:

Wee Bian Hock v. Keppel Shipyard Pte. Ltd. [1979] 1 MLJ 13 ***(dist)***

Chin Thong Thai v. Yoong Leok Kee Corporation Sdn. Bhd. (Seremban High Court Civil Suit No. 329 of 1976) ***(refd)***

Lim Ah Tah v. Pahang Consolidated Co. Ltd. [1984] 1 MLJ lxxii ***(refd)***

For the plaintiff - Mahinder Singh; M/s. Mahinder & Co.

For the defendant - Balendran Chong; M/s. Balendran Chong Haranay & Bodi

JUDGMENT

Hj. Lamin Bin Hj. Mohd. Yunus J:

This is a claim for personal injuries and consequential losses as a result of an accident which occurred on 28 December 1973. I now deal briefly with the history of this case. It was heard by the late Judicial Commissioner Mr. Jayadeva and the last day before him as I gather from the record available was on 17 July 1981 but fate had it that he was not to deliver the judgment of this case. At this juncture, I need only to say that in view of the problems which learned Counsel for both the plaintiff and the defendant had to face, it was agreed by both Counsel before me on 6 July 1990 that preparations would be made to make available to the Court the notes of the whole proceedings together with their submissions after which I was to deliver my judgment.

I have now read the evidence of all the witnesses for both the plaintiff and the defendant including that of DW3. I have also visited the scene of the accident.

Briefly the story of the plaintiff (PW1), Yusof B. Ahmad, was that on 28 December 1973 while working at the sawmill of the defendant, the plaintiff's right foot was injured. The logs at the sawmill were and are being sawn with the use of an electrically operated saw. Three persons were normally involved in the process. One person operates the sawing machine which consists of the log carriage, the saw and the rollers and he will be referred to here as the machine operator and in the present case the machine operator was one named Lim Keat Seng (DW2). The machine operator was in charge of the whole sawing operation. One of the other two persons would operate a winch in order to get a log onto the log carriage. Once the log is placed onto the log carriage, the third person will properly secure the log to the log carriage by using 3 log clippers. Once secured, the machine operator will then commence to operate the machine so that the log carriage will then move forward towards the cutting blade of the saw which is also in motion at speed. (Usually the person who places the log onto the log carriage by means of a winch was DW3 while the duty of securing the log to the log carriage was that of the plaintiff.) The log carriage continues moving forward until the whole log is completely cut into half. (The log carriage is found to the right of the machine operator as one faces the cutting blade of the saw.) When the whole log has been completely cut, the sawn timber will fall onto the rollers which are found to the left of the log carriage. The sawn timber is then taken further on to the front by the moving rollers. The sawn timber that falls onto the rollers may have to be correctly placed on the rollers by using an iron hook which is attached to a pole. The hook and the pole can be found on a wooden platform to the left of the rollers. After the log is completely cut and placed on the rollers, the log carriage is stopped. After that, the machine operator will operate the reverse gear of the machine and the log carriage will then move in reverse direction by passing him to his right and then stop at its original place to his rear. All the work of first putting the log onto the log carriage and bringing it towards the cutting blade of the saw and adjusting the sawn timber on the rollers are in full view of the machine operator. I mentally noted all this when I visited the scene.

According to the plaintiff, normally he and DW3 would assist the machine operator (DW2) in the sawing operation each having his part of the operation to perform as I have described above. But on the day of the accident, only he and DW2 worked. On that day, DW2 put the log onto the carriage by operating the winch and then he went to the machine to operate the saw. The plaintiff clipped the log to the carriage which on being operated upon by DW2 then moved forward heading for the cutting blade of the saw. When the log carriage moved, the plaintiff would then go to the small wooden platform where a hook with a pole was kept. His work was "to adjust the timber with the pole and hook to see that the sawn timber falls onto the rollers". When a log had been completely cut, the carriage would stop and the

plaintiff would go onto the carriage to release the other half of the log from the pins or clippers so that it would also fall onto the rollers.

That day, the hook fell down between the rollers and he wanted to retrieve it as it was his duty to do so. He put up his hand and looked down at the hook. He expected the machine operator to stop the log carriage but the carriage went on moving. So when he went to the roller support the log carriage was still moving and put his foot on the roller support and the carriage reversed and his foot was crushed. He admitted he should not have done that as it was against the instructions given to him earlier. He said that he signalled DW2 to stop the carriage by giving a hand signal, i.e. by raising his hand. According to him the carriage had to stop where the hook fell. He agreed that if the carriage had gone back to its original position, it would be easier to retrieve the fallen hook. But he had to walk back 10 feet to pick up the hook. He maintained that it was quite safe to pick up the hook when the carriage was still there.

After the lunch break on the first day of the hearing, when the cross-examination of the plaintiff resumed, the plaintiff somewhat changed his story.

"Now, I say I got off the carriage when it stopped. This morning I mistook the matter. Now, I say that when I raised my hand to signal to stop, the carriage stopped. The operator saw my signal and he stopped the carriage, I then got off the carriage. The carriage and the rollers are close to each other, I got onto the roller support with the intention of picking up the hook while standing on the roller support. My right foot was on the roller support . My other foot was on the carriage. The carriage then reversed. I raised my hand to stop the carriage. The carriage stopped and I put my foot on the roller support. The carriage moved and my leg got crushed." In his re-examination, he again said the accident happened when the carriage was reversing. This was after the log had been cut once.

After giving a close scrutiny of the evidence, I am inclined to accept PW1's evidence as narrated before the lunch break as being more probable. He had made no attempt to explain for the sudden twist in his evidence except to say that he "mistook the matter" in the morning. His own Counsel never even re-examined him with the view to extract a reasonable explanation from him. Perhaps he preferred to leave it to the Court simply to make the choice. If what PW1 had said after the lunch break was true I would think that in all probability the accident would not have happened. If in fact the machine operator did see PW1's signal and he stopped the carriage, one would expect him to wait until PW1 had picked up the hook and that it was safe for him to operate the log carriage again.

I now examine the defence's version of the accident. DW2 admitted that he was in complete charge of the sawing machine and the whole operation took place in his full view. It must be his duty to see that it was safe every time before the machine moved again. In cross-examination, DW2 admitted:

> It is my duty to see to the safety of the plaintiff ...
>
> The plaintiff is not supposed to be there as shown in photograph No. 2 in Ex. P8. If he stood there in that position, I would not reverse the carriage. Before reversing the carriage it is my duty to see that the plaintiff is safe.

According to DW2 it was the work of DW3 to retrieve the hook that fell or dropped between the rollers onto the ground. DW2 said the pole and the hook could be retrieved either by bending down under the rollers and then picking them up or by coming down from the wooden platform and going under the rollers. DW2 also said that the hook rarely fell between the rollers. DW3, on the other hand, said that in one day the hook fell two or three times. DW3 also admitted that "at times the plaintiff picked up the hook." But DW2 said that he was "definite" that the plaintiff did not any time during the 6 months he worked pick up the hook from under the rollers.

DW2 also said that the plaintiff never jumped from the carriage to the platform and in his own words if I may repeat:

> During my time, the plaintiff never at any time jump from the carriage across the rollers on to the platform ...

On the other hand, DW1 (the manager) had said that "sometimes, he jumped across from the moving carriage ... I saw the plaintiff do

this when I went to see ... I have seen the plaintiff jump from the carriage to the moving rollers and back." From the above contradictions it is not unreasonable for me to draw the inference that DW2, the machine operator, had not been very attentive in the course of performing his function.

On that day, a hook had fallen down between the rollers and the log carriage had stopped and the plaintiff wanted to retrieve the fallen hook. According to the plaintiff, as he stepped on the rollers from the carriage, the carriage reversed and his right foot was crushed between the head block of the carriage and the number 3 roller. He fell down on to the ground unconscious. He only regained consciousness at the hospital. As I see it however, if the accident occurred when the carriage was reversing, it suggests that the log had been completely cut once and the carriage must first stop and then reverse. Therefore, before the machine operator (DW2) decided to reverse the log carriage it must be his duty to see that there was nothing placed in imminent danger and that it was safe for DW2 to bring back the carriage to its original position behind him. DW2 testified in his examination-in-chief that on the day of the accident, he did not know whether there was a hook under the rollers and whether the plaintiff went to retrieve the hook. He then continued thus:

> When the sawn timber log had fallen on the rollers, the plaintiff will stand on the empty carriage holding on the bars of the log carriage. I reverse the carriage.

What he meant was that **usually** when the sawn timber log had fallen on the rollers, the plaintiff would stand on the empty carriage holding onto the bars of the log carriage. He would then reverse the carriage. One would expect the plaintiff to be on the carriage on its way back to its original position. He did not say whether or not he saw the plaintiff standing on the carriage just before he reversed it. He continued by saying:

> As I was reversing to the rear, I **turned my head** to the front and I saw his leg pinned on to the roller. I then stopped the carriage.

It is interesting to note when he said:

> As I was reversing to the rear, I turned my head to the front ...

This must mean that just before he reversed to the rear he must be looking somewhere else other than the front because of the words, "I turned my head". His attention should be directed to the front during the whole time while the log was being cut until the cutting was completed and the sawn timber had been placed on the rollers and the carriage had been stopped. He even told PW2 that he was concentrating on reversing the carriage. PW2's evidence in-chief reads:

> He (DW2) told me that he was concentrating on the reversing of the carriage and did not see the injured person.

He could not afford to look away at any time until he begins to reverse. The whole process took only a few minutes. Having been to the scene myself, I noted that there was nothing that would obstruct his view in front of him. The machine operator could see every human activity in front of him. In his cross-examination he said:

> After the log has been cut, I have never seen the plaintiff cross from the carriage onto the platform before I reversed the carriage. Most of the time I could see the plaintiff before I reversed the carriage. If the log was big, I could only see part of the plaintiff's head and part of his upper body but most of the time, I could see the plaintiff on the carriage.

Of course, how could he have seen the plaintiff crossing because he was not paying attention as to what was going on in front of him at that point of time. Otherwise he would have seen what went on. So if he had paid attention he must have seen whatever the plaintiff was doing then. According to DW2, he had given the plaintiff instructions what to do when the carriage was in motion and when it was stationary. He also supervised his work. It was argued by the defendant's Counsel that if the plaintiff chose to get off the carriage even with DW2 looking on there was nothing in the world that DW2 could have done to prevent the plaintiff from climbing onto the roller support when the carriage was moving. I do not agree. At least DW2 could have shouted at the plaintiff and stopped the machine.

Again, DW2 insisted that on that day as normal he was assisted by two persons namely DW3 and the plaintiff. On the other hand, the plaintiff maintained that he was alone helping DW2 that day. DW2 insisted that it was the

duty of DW3 to pick up any hook that had fallen onto the ground. If DW3 was there present, why should the plaintiff attempt to retrieve the fallen hook. Again it is interesting to note what DW3 had to say. In his examination-in-chief he said:

> I did not assist the plaintiff after the accident as I was there attending to the winch.

In other words, if he was in fact there at the time of the accident he would immediately have assisted the plaintiff. PW2 also said that there were two persons working on the machine that day. The injured person (PW1) and the operator. Whether he was working that day or not, the fact remains that he was not there when he should have been. Assuming what DW3 had said was true then, what business had he to attend to the winch at that time. I would expect him to be still on the wooden platform with the hook and pole in his hand to see that the sawn timber was properly on the rollers. The carriage had just stopped and was in the process of reversing meaning the cutting had just been completed. The winch was somewhere behind DW2. DW3 did not say why he was attending to the winch then. The carriage had not come back to its original position behind DW2 for the purpose of reloading it with another log:

> When I went to assist in carrying the plaintiff he was no longer on the rollers. He was about 4 or 5 feet away from the carriage.

The moment DW2 saw the plaintiff pinned down, he could easily have shouted to DW3 for help he being only a few feet behind him (as I observed when I was at the scene) i.e. if it was true that he (DW3) was at the winch. Yet DW2 went alone and carried the plaintiff from under the rollers. And yet DW3 managed to say that the plaintiff was "about 4 or 5 feet away from the carriage" when he went to assist in carrying him when he could have run together with DW2 to help the plaintiff when he was still at the rollers. In all probability DW3 was not there at the sawmill that day. But what is more important, DW3 was not on the wooden platform at the time of the accident to pick up the fallen hook which was his responsibility as claimed by DW2. The plaintiff was obviously doing the work of two men. His attempt to retrieve the hook, it was argued, was one that could be said as being in "inadvertent or careless" act which would not amount to contributory negligence: (*Wee Bian Hock v. Keppel Shipyard (Pte) Ltd.* [1979] 1 MLJ 13). I must recall here of what PW2 (Inspector of Machinery) said in regard to risk that a person who helped DW2 could face. He said:

> I would not say it would not be adequate to work with 2 persons. The work of the third person **on the platform** will have to be done by the person **on the carriage**. The arrangement will have to be done by the person on the carriage itself. If the worker is well trained it will not be risky for the same man to work on the carriage and the platform.

It is quite clear to me from the words of PW2 above, there was no absolute prohibition for the person working on the carriage to do the work of the person on the platform. It would appear that what PW2 meant was that the person who worked on the carriage could cross to the platform during the process and it would not be risky. Here I would agree because as I have found from my personal observation, the carriage moved only at one speed and it moved very slowly. How "well trained" must a person be before it becomes "not risky"? In my view, it would require only a little experience. So the question of absolute prohibition of movement from the carriage to the platform was not part of the system of work. In *Wee Bian Hock* case, the defendants were in breach of their statutory duty under s. 22(1) of the Factories Act in that they had not securely fenced the power-driven saw of the rib saw machine. So even if it was proved that the plaintiff was "inadvertent or careless" that would not amount to contributory negligence because the defendants were under a legal duty to fence the power-driven saw which they did not. In the present case, just because PW2 said that the plaintiff had contravened s. 20(2) of the Act, must it necessarily be concluded that the plaintiff was solely to blame. Section 20(2) reads:

> No person employed in any factory or in any place where any machinery is installed shall wilfully and without reasonable cause act in any manner so as to cause or to be likely to cause bodily injury to himself or other persons or damage to any machinery or other property.

It says: "**shall wilfully and without reasonable cause ...**" Was the act of the plaintiff in his attempt to retrieve the hook "wilful and without reasonable cause"? I do not think that

is the proper question to ask. The material question to be asked here is not whether or not the plaintiff's act was "wilful and without reasonable cause" or whether or not when he put his foot onto the roller support, the carriage was still moving. The material question to be asked here is did the plaintiff put up his hand when he looked down at the hook. Or did he put up his hand at all? He said he did when he looked down at the hook. I say so because it appeared from the system of work there, the plaintiff was to put up his hand if he wanted DW2 to stop the carriage. There was no emphatic denial from the defence. If for example DW2 had said, "I saw the plaintiff on the carriage all the time until the accident occurred, but he never once raised his hand," then I would consider what should be the appropriate inference to be drawn. But there was no such evidence from the defence. Since there was none, and DW2 had failed to be on a look-out and accordingly he had committed some degree of negligence as he was responsible for the safety of the plaintiff. As for the plaintiff, it is quite obvious from the evidence that he did not wait to make sure whether DW2 would stop the carriage. Thus he contributed to the negligence. I therefore apportion the liability with DW2 responsible for 60% and the plaintiff 40%.

The Medical Report (on page 1 of the bundle of documents) shows that the plaintiff was under treatment from 28 December 1973 to 10 October 1974 when it was found there was still a persistent "ulcer".

Though the plaintiff said that he did not work for 5 years after the accident, in 1976 and 1977 he helped his father in planting tobacco. But he said he was not paid. On l January 1978 he began working with PW3. His nature of work was to bundle the sawn timber at the rate of 30 cents per bundle. His daily pay was RM5.

DW1, the plaintiff's employer, gave evidence as to the plaintiff's salary and produced his salary book which showed that before the accident the plaintiff's average earnings per month was RM238. DW1 stated in evidence that since 1978 the highest payment received by the plaintiff was RM388.90 and that his average in 1978 was RM291 per month and for 1979 was RM325 per month and for 1980 it was RM306 per month. Those figures are from the records of payment to the plaintiff as shown in P2A and B. According to PW3 when the plaintiff started to take contract work from PW3 in 1978 for bundling cut timber, the plaintiff sometimes worked alone and sometimes with 3 others. Anyway the above payment was for the plaintiff and his 3 workers.

According to the plaintiff his salary at the time of the accident was RM350 per month. His daily pay was RMl5. He had no documentary evidence to support his claim.

According to the medical report of Dr. A.F.M. Jaques, as a result of the accident, the plaintiff suffers a crushed injury to the right foot avulsing the skin of the whole of the posterior half of the sole and part of the dorsum of the foot. He was treated in the Kuantan General Hospital for over three months which involved skin grafting to replace the lost skin. Total healing of the wound took another two months. He now has a deformity of the right foot and walks with a limp. He is unable to run. He suffers pain when walking and is unable to walk for long distances. In the case of *Chin Thong Thai v. Yoong Leok Kee Corporation Sdn. Bhd.* (Seremban High Court Civil Suit No. 329 of 1976) the plaintiff aged 24 years at the time of the accident suffered a somewhat similar injury to his right foot. But the final result was that the foot had to be amputated. The Court awarded as general damages for the injuries, pain and suffering a sum of RM28,000 on a 100% liability. In the case of *Lim Ah Tah v. Pahang Consolidated Co. Ltd.* [1984] MLJ March issue at page lxxii *vide* Kuantan High Court Civil Suit No. 150 of 1980, the plaintiff suffered a serious crush of the right foot with dislocation and subluxation of the forefoot. The foot became deformed with loss of the arches and abduction rotation of the forefoot. He was unable to run or even walk fast. On a 100% liability he was awarded RM20,000 for pain and suffering.

In the case before me on a 100% liability I make the following awards:

1. General damages - RM25,000 for pain and suffering.
2. Loss of earning -
    a. Loss of earning at an average of RM240 per month (average of RM238 per month to a round figure of RM240 per month) for 24 months - RM240 x 24 = RM5,760 (from 1 January 1974 to 1 January 1978 = 48 months

But 1 January 1976 to 1 January 1978 (24 months) he was able to work but helping his father).

b. The plaintiff was 26 years old at time of accident, he would be 30 as at 1 January 1978 therefore a loss of earning capacity thereafter from 1 January 1978 to 1 September 1991 at RM100 - 165 months x RM100 = RM16,500 (As the contract work was being performed by 3 persons i.e. plaintiff and 3 others and so as a rough estimate plaintiff would only get about RM100 per month).

c. On the above general damages at 6% interest from date of service to date of judgment.

d. Plaintiff's prayer for 9 years on the tables at RM100 is allowed - RM8,529.

e. Interest at 8% from date of judgment to date of realisation.

f. Costs.